

NDISPO,STAYDI

**U.S. District Court  
District of Colorado (Denver)  
CIVIL DOCKET FOR CASE #: 1:12-cv-02497-CMA-MJW**

Moore, et al v. Town of Erie, Colorado, et al

Assigned to: Judge Christine M. Arguello

Referred to: Magistrate Judge Michael J. Watanabe

Case in other court: District Court, Boulder, 2012CV613

Cause: 42:1983 Civil Rights Act

Date Filed: 09/19/2012

Jury Demand: Both

Nature of Suit: 440 Civil Rights: Other

Jurisdiction: Federal Question

**Plaintiff**

**Brittany Moore**

*by and through her next friend, minors  
other*

Kaitlin Rose Landis

*other*

Kirstin Rae Landis

*other*

Kaymen Renee Landis

*also known as*

Brittany Landis

represented by **Jay Wayne Swearingen**

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**TERMINATED: 05/21/2013**

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V.

**Defendant**

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represented by **Sean James Lane**  
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**Defendant**

**Jamie Chester**

*Erie Police Officer (badge #E-23), in his official capacity*

represented by **Sean James Lane**  
(See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Jonathan Ariel Cross**  
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**Defendant**

**Jamie (I) Chester**

represented by **Jonathan Ariel Cross**  
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**LEAD ATTORNEY**  
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**Sean James Lane**  
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**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

Date Filed	#	<a href="#">clear</a>	Docket Text
09/19/2012	<a href="#">1</a>	<input type="checkbox"/>	NOTICE OF REMOVAL by Jamie Chester, Town of Erie, Colorado from Boulder District Court, Case Number 2012CV613. (Filing fee \$ 350, Receipt Number 1082-3027132), filed by Jamie Chester, Town of Erie, Colorado. (Attachments: # <a href="#">1</a> Civil Cover Sheet, # <a href="#">2</a> Supplemental Civil Cover Sheet, # <a href="#">3</a> Exhibit Complaint and Jury Demand, # <a href="#">4</a> Exhibit District Court Civil Case Cover Sheet, # <a href="#">5</a> Exhibit District Court Summons, # <a href="#">6</a> Exhibit District Court Delay Prevention Order)(Cross, Jonathan) (Entered: 09/19/2012)
09/19/2012	2		Case assigned to Judge John L. Kane and drawn to Magistrate Judge Michael J. Watanabe. Text Only Entry (johar, ) (Entered: 09/20/2012)
09/19/2012	<a href="#">3</a>	<input type="checkbox"/>	COMPLAINT against Jamie Chester, official, Jamie (I) Chester, Town of Erie, Colorado, filed by Brittany Moore.(johar, ) Modified on to reflect Jamie Chester in his official capacity 9/20/2012 (johar, ). (Entered: 09/20/2012)
09/20/2012	<a href="#">4</a>	<input type="checkbox"/>	MEMORANDUM RETURNING CASE by Senior Judge Kane. (jjhsl, ) (Entered: 09/20/2012)
09/20/2012	5		CASE REASSIGNED pursuant to <a href="#">4</a> Memorandum Returning Case. This case is reassigned to Judge Christine M. Arguello. All future pleadings should be designated as 12-cv-2497-CMA-MJW. Text Only Entry (jjhsl, ) (Entered: 09/20/2012)
09/25/2012	6		ORDER REFERRING CASE to Magistrate Judge Michael J. Watanabe. Magistrate Judge Watanabe is designated to conduct NDISPO proceedings pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) and Fed.R.Civ.P. 72(a) and (b). The parties should expect to be given a firm trial setting that is 60 to 120 days from the date of the final pretrial conference, and should be available for trial accordingly. FURTHER, Court sponsored alternative dispute resolution is governed by D.C. COOLCivR 16.6. On the recommendation or informal request of the magistrate judge or on the request of the parties by motion, the Court may direct the parties to engage in an early neutral evaluation, a settlement conference, or another alternative dispute resolution proceeding. By Judge Christine M. Arguello on 09/25/12. Text Only Entry (cmasec) (Entered: 09/25/2012)
09/26/2012	<a href="#">7</a>	<input type="checkbox"/>	ORDER Scheduling Conference set for 11/19/2012 03:30 PM in Courtroom A 502 before Magistrate Judge Michael J. Watanabe, by Magistrate Judge Michael J. Watanabe on 9/26/2012. (mjwcd) (Entered: 09/26/2012)
09/27/2012	<a href="#">8</a>	<input type="checkbox"/>	MOTION to Dismiss by Defendants Jamie Chester, Jamie (I) Chester, Town of Erie, Colorado. (Attachments: # <a href="#">1</a> Proposed Order (PDF Only))(Cross, Jonathan) (Entered: 09/27/2012)

10/18/2012	<a href="#">9</a>	<input type="checkbox"/>	NOTICE of Entry of Appearance by Juliet R. Piccone on behalf of All Plaintiffs (Piccone, Juliet) (Entered: 10/18/2012)
10/18/2012	<a href="#">10</a>	<input type="checkbox"/>	RESPONSE to <a href="#">8</a> MOTION to Dismiss filed by Plaintiff Brittany Moore. (Attachments: # <a href="#">1</a> Exhibit 1, # <a href="#">2</a> Exhibit 2, # <a href="#">3</a> Exhibit 3)(Piccone, Juliet) (Entered: 10/18/2012)
11/01/2012	<a href="#">11</a>	<input type="checkbox"/>	REPLY to Response to <a href="#">8</a> MOTION to Dismiss filed by Defendants Jamie Chester, Jamie (I) Chester, Town of Erie, Colorado. (Lane, Sean) (Entered: 11/01/2012)
11/12/2012	<a href="#">12</a>	<input type="checkbox"/>	Proposed Scheduling Order by Plaintiff Brittany Moore. (Piccone, Juliet) (Entered: 11/12/2012)
11/19/2012	<a href="#">13</a>	<input type="checkbox"/>	COURTROOM MINUTES/MINUTE ORDER for proceedings held before Magistrate Judge Michael J. Watanabe: Scheduling Conference held on 11/19/2012. Discovery due by 6/19/2013. Dispositive Motions due by 8/19/2013. Proposed Pretrial Order due by 10/16/2013. Final Pretrial Conference set for 10/21/2013 09:00 AM in Courtroom A 502 before Magistrate Judge Michael J. Watanabe. Court Reporter: FTR - Ellen E. Miller. (mjwcd) (Entered: 11/19/2012)
11/19/2012	<a href="#">14</a>	<input type="checkbox"/>	SCHEDULING ORDER: Entered by Magistrate Judge Michael J. Watanabe on 11/19/2012. (mjwcd) (Entered: 11/19/2012)
02/01/2013	<a href="#">15</a>	<input type="checkbox"/>	MOTION to Stay of <i>Discovery</i> by Defendants Jamie Chester, Jamie (I) Chester, Town of Erie, Colorado. (Cross, Jonathan) (Entered: 02/01/2013)
02/01/2013	16		MEMORANDUM regarding <a href="#">15</a> MOTION to Stay of <i>Discovery</i> filed by Jamie Chester, Town of Erie, Colorado, Jamie (I) Chester. Motion referred to Magistrate Judge Michael J. Watanabe by Judge Christine M. Arguello on 02/01/13. Text Only Entry (cmasec) (Entered: 02/01/2013)
02/01/2013	<a href="#">17</a>	<input type="checkbox"/>	MINUTE ORDER re: response to <a href="#">15</a> MOTION for Stay of Discovery by Magistrate Judge Michael J. Watanabe on 2/1/13. (dkals, ) (Entered: 02/01/2013)
02/13/2013	<a href="#">18</a>	<input type="checkbox"/>	RESPONSE to <a href="#">15</a> MOTION to Stay of <i>Discovery</i> filed by Plaintiff Brittany Moore. (Piccone, Juliet) (Entered: 02/13/2013)
02/15/2013	<a href="#">19</a>	<input type="checkbox"/>	MINUTE ORDER granting <a href="#">15</a> Defendants' Motion to Stay Discovery. All Discovery is STAYED until Judge Arguello rules on the Defendants' Motion to Dismiss (8) or as otherwise ordered by the court. By Magistrate Judge Michael J. Watanabe on 2/15/2013.(mjwcd) (Entered: 02/15/2013)
05/19/2013	<a href="#">20</a>	<input type="checkbox"/>	MOTION to Withdraw as Attorney of Record by Plaintiff Brittany Moore. (Piccone, Juliet) (Entered: 05/19/2013)
05/21/2013	21		ORDER GRANTING <a href="#">20</a> Motion to Withdraw as Attorney. Attorney Juliet R. Piccone terminated as counsel for Plaintiffs. FURTHER ORDERED that the Clerk of the Court is DIRECTED to delete Ms. Piccone's email address from future ECF filings and electronic notifications in this case. The Court further notes that Plaintiffs continue to be represented in this matter by attorneys of The Animal Law Center, LLC. SO ORDERED BY Judge Christine M. Arguello on

			05/21/13. Text Only Entry(cmasec) (Entered: 05/21/2013)
07/19/2013	<a href="#">22</a>	<input type="checkbox"/>	ORDER granting in part and denying in part <a href="#">8</a> Motion to Dismiss by Judge Christine M. Arguello on 7/19/13.(dkals, ) (Entered: 07/19/2013)
07/19/2013	<a href="#">23</a>	<input type="checkbox"/>	MINUTE ORDER amending the <a href="#">14</a> Scheduling Order: Discovery due by 11/19/2013. Dispositive Motions due by 12/19/2013. Final Pretrial Conference reset to 3/20/2014 10:00 AM before Magistrate Judge Michael J. Watanabe. By Magistrate Judge Michael J. Watanabe on 7/19/13. (dkals, ) (Entered: 07/19/2013)
07/26/2013	<a href="#">24</a>	<input type="checkbox"/>	MOTION to Clarify by Defendants Jamie Chester, Town of Erie, Colorado. (Cross, Jonathan) (Entered: 07/26/2013)
07/29/2013	<a href="#">25</a>	<input type="checkbox"/>	RESPONSE to <a href="#">24</a> MOTION to Clarify filed by Plaintiff Brittany Moore. (Swearingen, Jay) (Entered: 07/29/2013)
07/29/2013	26		MEMORANDUM regarding <a href="#">24</a> MOTION to Clarify filed by Jamie Chester, Town of Erie, Colorado. Motion referred to Magistrate Judge Michael J. Watanabe by Judge Christine M. Arguello on 07/29/13. Text Only Entry (cmasec) (Entered: 07/29/2013)
07/29/2013	<a href="#">27</a>	<input type="checkbox"/>	MINUTE ORDER granting <a href="#">24</a> Motion for Clarification: Discovery is due by 1/20/2014. Dispositive Motions are due by 2/19/2014. The Final Pretrial Conference is reset for 5/20/2014 09:00 AM before Magistrate Judge Michael J. Watanabe. By Magistrate Judge Michael J. Watanabe on 7/29/13.(dkals, ) (Entered: 07/29/2013)
08/01/2013	<a href="#">28</a>	<input type="checkbox"/>	ANSWER to <a href="#">3</a> Complaint and Jury Demand by Jamie Chester, Jamie (I) Chester, Town of Erie, Colorado.(Lane, Sean) (Entered: 08/01/2013)
11/04/2013	<a href="#">29</a>	<input type="checkbox"/>	Unopposed MOTION to Continue <i>Modify the Amended Scheduling Order</i> by Plaintiff Brittany Moore. (Swearingen, Jay) (Entered: 11/04/2013)
11/04/2013	30		MEMORANDUM regarding <a href="#">29</a> Unopposed MOTION to Continue <i>Modify the Amended Scheduling Order</i> filed by Brittany Moore. Motion referred to Magistrate Judge Michael J. Watanabe by Judge Christine M. Arguello on 11/04/13. Text Only Entry (cmasec) (Entered: 11/04/2013)
11/04/2013	<a href="#">31</a>	<input type="checkbox"/>	Unopposed MOTION to Amend/Correct/Modify <a href="#">29</a> Unopposed MOTION to Continue <i>Modify the Amended Scheduling Order</i> by Plaintiff Brittany Moore. (Attachments: # <a href="#">1</a> Proposed Order (PDF Only))(Swearingen, Jay) (Entered: 11/04/2013)
11/04/2013	32		MEMORANDUM regarding <a href="#">31</a> Unopposed MOTION to Amend/Correct/Modify <a href="#">29</a> Unopposed MOTION to Continue <i>Modify the Amended Scheduling Order</i> filed by Brittany Moore. Motion referred to Magistrate Judge Michael J. Watanabe by Judge Christine M. Arguello on 11/04/13. Text Only Entry (cmasec) (Entered: 11/04/2013)
11/04/2013	<a href="#">33</a>	<input type="checkbox"/>	MINUTE ORDER granting <a href="#">29</a> plaintiffs' Unopposed Motion to Modify the Amended Scheduling Order. Scheduling Order <a href="#">14</a> is amended. Discovery due by 4/21/2014. Dispositive Motions due by 5/19/2014. Final Pretrial Conference

			5/20/2014 09:00 AM is vacated. Final Pretrial Conference reset for 7/18/2014 09:30 AM in Courtroom A 502 before Magistrate Judge Michael J. Watanabe. By Magistrate Judge Michael J. Watanabe on 11/4/2013.(mjwcd) (Entered: 11/04/2013)
11/04/2013	<a href="#">34</a>	<input type="checkbox"/>	MINUTE ORDER denying as moot <a href="#">31</a> plaintiffs' Unopposed Motion to Modify the Amended Scheduling Order, by Magistrate Judge Michael J. Watanabe on 11/4/2013.(mjwcd) (Entered: 11/04/2013)
02/03/2014	<a href="#">35</a>	<input type="checkbox"/>	Unopposed MOTION to Amend/Correct/Modify <a href="#">33</a> Order on Motion to Continue, <i>Modify the Amended Scheduling Order</i> by Plaintiff Brittany Moore. (Swearingen, Jay) (Entered: 02/03/2014)
02/04/2014	36		MEMORANDUM regarding <a href="#">35</a> Unopposed MOTION to Amend/Correct/Modify <a href="#">33</a> Order on Motion to Continue, Modify the Amended Scheduling Order filed by Brittany Moore. Motion referred to Magistrate Judge Michael J. Watanabe. By Judge Christine M. Arguello on 2/4/2014. Text Only Entry (cmacd) (Entered: 02/04/2014)
02/04/2014	<a href="#">37</a>	<input type="checkbox"/>	MINUTE ORDER granting <a href="#">35</a> plaintiff's Unopposed Motion to Further Modify the Scheduling Order. Scheduling Order <a href="#">14</a> is amended. Discovery due by 6/23/2014. Dispositive Motions due by 7/21/2014. Final Pretrial Conference 7/18/2014 09:30 AM is vacated. Final Pretrial Conference reset for 9/3/2014 09:30 AM in Courtroom A 502 before Magistrate Judge Michael J. Watanabe. By Magistrate Judge Michael J. Watanabe on 2/4/2014.(mjwcd) (Entered: 02/04/2014)
02/28/2014	<a href="#">38</a>	<input type="checkbox"/>	NOTICE of Entry of Appearance by Tiffany Jo Drahota on behalf of Brittany Moore Attorney Tiffany Jo Drahota added to party Brittany Moore(pty:pla) (Drahota, Tiffany) (Entered: 02/28/2014)

<p>District Court, Boulder County, Colorado 7325 S. Potomac Street Boulder, CO 80112</p>	<p>EFILED Document CO Boulder County District Court 20th JD Filing Date: Jul 5 2012 8:01PM MDT Filing ID: 45181783 Review Clerk: Natascha Wise</p>
<p>Plaintiffs: <b>BRITTANY MOORE (aka BRITTANY LANDIS), KAITLIN ROSE LANDIS, KIRSTIN RAE LANDIS and KAYMEN RENEE LANDIS, minors by and through her next friend, Brittany Moore,</b>  v.  Defendants: <b>TOWN OF ERIE, COLORADO and ERIE POLICE OFFICER JAMIE CHESTER (badge #E-23), in his official and individual capacity</b></p>	<p>↑ COURT USE ONLY ↑</p>
<p>Attorney for Plaintiffs: Jay W. Swearingen (Reg. # 4842) Jennifer Reba Edwards (Reg. # 38349) The Animal Law Center 4465 Kipling Street, Suite 108 Wheat Ridge, CO 80033 Phone Number: 303-322-4355 Fax Number: 303-322-4354 <a href="mailto:jre@theanimallawcenter.com">jre@theanimallawcenter.com</a> <a href="mailto:jws@theanimallawcenter.com">jws@theanimallawcenter.com</a></p>	<p>Case No.:  Division:</p>
<b>COMPLAINT AND JURY DEMAND</b>	

COMES NOW, Plaintiffs Brittany Moore, Kaitlin Rose Landis, Kirstin Rae Landis and Kaymen Renee Landis, by and through their counsel, The Animal Law Center, and hereby file this Complaint and Jury Demand. Plaintiffs respectfully allege as follows:

#### **INTRODUCTION**

1. Plaintiffs bring this civil rights action pursuant to 42 U.S.C. §§ 1983 and 1988 for relief through compensatory damages and attorney's fees stemming from Defendants' violations of Plaintiffs' rights guaranteed by the Fourth and

Fourteenth Amendments to the Constitution of the United States. Defendants' conduct under color of state and municipal law proximately caused the deprivation of Plaintiffs' federally protected rights. Plaintiffs seek relief through compensatory damages, and attorney's fees.

2. This action arises under the Constitution and laws of the United States including Article III, Section 1 of the United States Constitution and 42 U.S.C. § 1983. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1333. This Court has authority to grant the declaratory relief requested herein pursuant to 28 U.S.C. § 2201.
3. This is also an action under Colorado law alleging intentional infliction of severe emotional harm and willful and wanton negligence.
4. Venue is proper in County of Boulder, State of Colorado, pursuant to 28 U.S.C. § 1331 and 28 U.S.C.A. § 1333(3) under the Supremacy Clause of the Constitution of the United States. All of the events alleged herein occurred within the State of Colorado, and all of the parties are residents of the State of Colorado.
5. Jurisdiction supporting Plaintiffs' claim for attorney's fees is conferred by 42 U.S.C. § 1988.
6. Venue is proper in the District Court for Boulder County, as all acts complained of occurred herein. Plaintiff and Defendants reside or are located in Boulder County.

#### **PARTIES**

7. Plaintiffs Brittany Moore, Kaitlin Rose Landis, Kirstin Rae Landis, and Kayman Renee Landis (collectively "Plaintiffs," "the Moores" or "Plaintiffs Moore") are

individuals residing in the Town of Erie, Boulder County, Colorado. At all times pertinent Plaintiffs resided in the Town of Erie, Boulder County, Colorado.

8. Brittany Moore is the natural mother of Kaitlin Rose Landis, Kirstin Rae Landis and Kaymen Renee Landis, minors.
9. Brittany Moore is also known as Brittany Landis.
10. Defendant Town of Erie is a municipality incorporated under the laws of the State of Colorado for purposes of liability under 42 U.S.C. § 1983. It carries out law enforcement activities through the Erie Police Department.
11. The Erie Police Department is a department of Defendant Town of Erie, a municipality incorporated under the laws of the State of Colorado for purposes of liability under 42 U.S.C. § 1983.
12. Defendant Town of Erie Police Officer Jamie Chester (badge # E-23) ("Officer Chester") was at all times relevant to this complaint duly appointed and sworn as a police officer working for the Erie Police Department. He is a Named Defendant in both his individually and official capacity. Officer Chester acted under color of law in the course of carrying out the actions and omissions that violated Plaintiffs' rights.
13. Defendants acted under color of state and municipal law. Alternatively, or in combination, Defendants acted under color of federal law.
14. All of the events described herein occurred in the Town of Erie, County of Boulder, and State of Colorado.

#### **FACTUAL BACKGROUND**

15. At the time of the incident described herein, the Plaintiffs, Brittany Moore and her three minor children owned a five-year-old German Shepherd female named Ava and were pet guardians for Ava.
16. At the time of the incident, all Plaintiffs also had a possessory interest in Ava.
17. The Plaintiffs at all times material hereto, resided at 437 Conrad Drive, Erie, CO 80516.
18. Ava was well known to Brittany Moore's neighbors and had a reputation for being a "sweet dog," who played with the neighborhood children on a regular basis and had never shown any signs of aggressive behavior towards people or dogs.
19. Ava was very familiar with the next-door neighbors, the Feero's, and often went next door to their house and was given a treat.
20. On or about May 10, 2011, at approximately 7:56 P.M., the Town of Erie Dispatch received a 911 call from Plaintiff Brittany Moore reporting a threatening phone call she had just received, from the ex-wife of her boyfriend, Mark Bull, and she requested an officer come to the property for the protection of her and her family.
21. Officer Jamie Chester was dispatched and responded to the call.
22. Instead of going to Plaintiffs' house located at 437 Conrad Drive, Erie, Colorado 80516, Officer Chester went to the wrong address, arriving and parking on the south side of the Feero's property, located at 443 Conrad Drive, Erie, Colorado 80516.

23. Mr. Andrew Feero is Ms. Moore's next-door neighbor and resides, with his wife, Sonja, on the property where Ava was shot and killed by Officer Chester.
24. Officer Chester mistakenly went to the front door of the Feero residence to contact Brittany Moore. He knocked on the door several times and then contacted Dispatch. He heard people next door and finally realized he had gone to the wrong address. He then proceeded toward the Plaintiffs' residence, which was next door.
25. At the time Officer Chester arrived at the wrong address, Plaintiff Brittany Moore was standing on her front porch, talking on her cell phone with her friend Celeste Sullivan. They were discussing the threatening call she had just received. Brittany Moore also told Ms. Sullivan that she had called the police and was expecting them to arrive right away.
26. Plaintiff Brittany Moore's dogs, Ava and Ivy, were lying in Plaintiffs' yard at this point, Ava was chewing a rawhide bone.
27. While still on the phone with Ms. Sullivan outside, Brittany Moore observed Officer Chester walking toward her property across the Feero's property. She immediately went around the large tree in her front yard to meet Officer Chester.
28. As Brittany Moore went around the tree toward the Feero property, she saw Ava and Ivy walking over to the Feero's property following Officer Chester, with Ava still having the rawhide chew in her mouth.
29. At no time did Brittany Moore observe either dog show or demonstrate aggression of any kind toward Officer Chester.

30. At approximately the same time, Mr. Andrew Feero was standing close to the property line dividing his property from Brittany Moore's yard.
31. Mr. Feero observed Officer Chester walking down his driveway apparently headed toward the Moore property.
32. Mr. Feero's SUV was parked in his driveway, with the back end toward the garage door and the front of the SUV pointed to the street
33. Mr. Feero saw Ava and Ivy get up and begin to approach Officer Chester, with Ava still having a rawhide bone in her mouth.
34. Mr. Feero did not see either dog show any aggression toward Officer Chester at any time.
35. Mr. Feero did see Officer Chester take notice of the dogs and begin to back up, with his hand on his holstered gun.
36. Officer Chester began walking backwards around the front of Mr. Feero's SUV and then up the driveway toward the garage.
37. Mr. Feero saw the dogs continue to follow Officer Chester with curiosity, but no aggression.
38. Mr. Feero then saw Officer Chester walking backwards behind his SUV, as Officer Chester reached the passenger side corner of the rear of the SUV, he saw Officer Chester draw his gun and fire one shot, which hit and mortally wounded Ava, without any justification..
39. There was approximately four to five feet between the rear end of the SUV and the garage door, where Officer Chester was walking towards the Moore property.

40. Simultaneously, Brittany Moore was following the dogs from her property around the front of the SUV. She saw the dogs as they went around the SUV and walked toward the garage door.
41. As the dogs got to the left rear corner of the SUV, Plaintiff Brittany Moore saw Officer Chester about at the right rear corner of the SUV, stop walking backward from the dogs.
42. Brittany Moore saw this and called out “nein,” which is the German word for “no.” The rawhide toy was still in Ava mouth. Ms. Moore gave the command out of courtesy for Officer Chester. She never saw the dogs show any act of aggression toward Officer Chester.
43. Seeing Officer Chester backing up with his hand on his holster looking at Ava and Ivy, is what caused Brittany Moore to call to Ava to stop her from walking any closer to Officer Chester. She was concerned about the safety of both dogs from seeing Officer Chester’s behavior, namely, putting his hand on the holster of his gun.
44. At the command, both Ava and Ivy stopped walking and Ava turned her head to look at Brittany, still with the rawhide toy in her mouth.
45. As Ava was stopped approximate four to six feet from Officer Chester, with her head turned to look at Brittany Moore and the toy still in her mouth, Officer Chester drew his service revolver, took aim with both hands on the gun and shot Ava.
46. Ava screamed and immediately dropped to the ground gravely wounded. Ivy initially ran away at the sound of the gunshot, but Mr. Feero later saw Ivy return

to Ava and try to get her up. Ava dropped the rawhide bone that was in her mouth at the time she was shot, where it remained on the driveway for several days

47. The bullet entered Ava's left dorsal chest area, which actually is the area behind her left shoulder on her back. Ms. Moore and Dezideria Cain watched as Ava dropped to the ground.
48. Brittany Moore saw Officer Chester backing up with his hand on his holster, as did Mr. Feero, and another eyewitness, Dezideria Martinez Cain. None of the witnesses saw Ava or Ivy act with any type of aggression toward Officer Chester. They all saw Ava stopped, standing still, four to six feet away from Officer Chester, when he shot Ava.
49. Ms. Moore screamed at the sight of her beloved dog, now lying twitching and whimpering in the driveway.
50. Brittany Moore immediately went back to her home to make sure her children did not come out and either see Ava or face danger from Officer Chester.
51. Officer Chester shot and killed Ava without any justification and without just cause. He knew that he did not have just or reasonable cause for the shooting.
52. Ava was shot in the back by her left shoulder area and was shot from more than four feet away from Officer Chester, and not at a distance of six to ten inches, as he claimed in his report.
53. Officer Chester knowingly, deliberately, and intentionally lied about Ava's actions and position prior to her being shot, in his statements both written and oral.

54. Officer Chester knowingly, deliberately, and intentionally fabricated a story to attempt to justify his fatal shooting of Ava, and filed a false report with the Erie Police Department about the incident and lied to the Plaintiff Brittany Moore about what had occurred.
55. Officer Chester met with other Erie police officers, including Sgt. Brown, and discussed the shooting incident prior to the time Officer Chester filed his written statement with the police department or was interviewed by the Boulder County District Attorney's office.
56. Officer Chester never even apologized to the Plaintiffs for shooting and killing Ava.
57. Officer Chester had previously shot and killed another dog while on duty as a police officer for the Town of Erie, so he and the Town of Erie understood that this shooting would be investigated and that his actions would be questioned.
58. Officer Chester, following the shooting of Ava, neither approached Ava to check her condition, nor called for any type of medical assistance for Ava, who was still alive and lying on the concrete driveway following the shooting. He did contact Dispatch to advise them he had shot a dog.
59. Brittany Moore, immediately after the shooting of Ava, was extremely concerned that her three children might come out of the house and see Ava lying there. So, she went back to her house to keep the girls inside.
60. Officer Chester followed her over to her property and despite repeated requests from Brittany for him to do something to help her dying family pet, he took no

action to help Ava, and even ordered Brittany Moore not to go to Ava, to check on her or assist her.

61. Officer Chester immediately acted belligerently toward Brittany Moore, yelling at her and approaching her very closely.

62. Mr. Feero observed Officer Chester's actions and heard the conversation between Officer Chester and Brittany, and believed that Officer Chester was attempting to goad Brittany Moore into taking some type of physical action against Officer Chester for which she could be charged.

63. Mr. Feero went over to the Moore property and tried to physically insert himself between Ms. Moore and Officer Chester to protect Ms. Moore from officer Chester, without further antagonizing Officer Chester.

64. Officer Chester knowingly, deliberately, and intentionally lied in his written report about asking Brittany Moore or Mr. Feero if they had a kennel, so someone could take Ava to a veterinarian for care.

65. Ava has been trained in and passed an off leash obedience class, and is used to obeying certain commands, including the "no" command being given in German.

66. Shortly after the shooting, Sergeant Rex Brown (badge # E-7) appeared on the scene.

67. At some point an Erie Police Lieutenant also came to the scene.

68. Mr. Feero was very briefly interviewed by Officer Chester and Sgt. Brown and asked about the incident. After seeing Ava shot for no reason by Officer Chester on his property with the gunshot essentially directed toward his front porch and seeing Officer Chester attempting to intimidate and or goad Ms. Moore into

taking some action for which she could be arrested, Mr. Feero was quite concerned about his own safety and wellbeing.

69. When questioned, Mr. Feero specifically asked if any remarks he made would be “off the record” and was assured that this was the case by the Erie police.

70. Due to his fear of what the police might do and the desire to get them off his property as quickly as possible, Mr. Feero deliberately told them what he believed they wanted to hear rather than what he knew to be accurate. Mr. Feero wanted the Erie police to leave his property as soon as possible.

71. Mr. Feero was asked at the scene to come to the police station and make a formal statement and he declined. A couple of days later, Mr. Feero did provide a written statement to the Erie police, which was truthful and did directly contradict what he felt forced to say previously at the scene of the incident.

72. Mr. Feero, a few minutes after witnessing the shooting, went in and got a sheet to cover Ava to hide her now bloodied and dying body from view of the neighbors and Brittany Moore’s children.

73. People were gathering outside as a result of hearing a gunshot in their usually quiet, family-friendly neighborhood. At least one individual began shooting video of the shooting scene, and Officer Chester talking with Ms. Moore, shortly after the shooting.

74. Ava’s body was eventually taken to the Veterinary Diagnostic Laboratories at Colorado State University’s College of Veterinary Medicine and Biomedical Sciences (herein after “CSU”), by Brittany’s brother. Dr. Gary Mason, DVM, PhD, DACVP performed a necropsy on Ava.

75. Dr. Mason's necropsy report states that the extension of the wound channel was through the left caudal lung lobe, diaphragm and left lateral liver lobe. The bullet was recovered from where it was lodged in Ava's craniodorsal abdomen.
76. The Town of Erie police department does not have a specific policy regarding the use of force on domestic animals.
77. The Town of Erie Police Department has provided no training to its officers, including officer Chester, regarding the use of force against pet animals, despite at least one previous killing of a domestic pet by Officer Chester.
78. There are numerous pets owned by the residents of the Town of Erie, many of which are at the scene of investigations or other activity conducted by the Town of Erie police department.
79. The Town of Erie owes an affirmative duty to its residents to keep their property, including pet animals, from being killed or injured by police officers, without proper justification.
80. The Town of Erie is and has been fully aware that its residents' pet animals come into regular contact with armed police officers.
81. The Town of Erie has no policy or provision to provide emergency medical care, treatment, or transportation for pet animals suffering injury as a result of actions by its employees, including police officers.
82. The Town of Erie, in blatant disregard of the property and safety interests of its residents, has failed and or refused to adopt policies or procedures to protect the Fourth Amendment rights of its residents.

83. The Plaintiffs have fully complied with the notice provision of the Colorado Governmental Immunity Act, and timely notified all Defendants named in this Complaint, as required by C.R.S. § 24-10-109.
84. Brittany Moore's children, also listed as Plaintiffs, suffered severe emotional trauma and distress as a result of the dog being killed outside their home for no reason.
85. Psychological counseling has been required for the Moore family.
86. The children have also exhibited evidence of severe emotional distress both at home and at school.
87. Brittany Moore has also suffered server emotional distress as a direct result of seeing Ava shot and killed by Officer Chester and his actions.

#### **FIRST CLAIM FOR RELIEF**

(42 U.S.C. § 1983 Fourth Amendments Violation)

88. Plaintiffs incorporate paragraphs 1-87 of this Complaint for purposes of this claim.
89. This Claim is brought against Defendant Officer Chester, in both his individual and official capacity.
90. As described herein, Officer Chester, while acting under color of law, unlawfully and without due process of law, deprived the Plaintiffs of the securities, rights, privileges, liberties, and immunities secured by the Constitution of the United States of America, Officer Chester wantonly, knowingly, recklessly, and

excessively used unnecessary force without any reasonable justification or probable cause in drawing his weapon and fatally shooting Ava.

91. These actions were in violation of the Plaintiffs' rights under the Fourth Amendment to the Constitution of the United States.
92. Officer Chester, prior to his killing of Ava, knew or should have known and understood that the owners of the dog had a constitutionally protected property interest in Ava.
93. Officer Chester knew or should have known that shooting a dog would constitute a "seizure" of the property of its owner(s), and that the owners' property rights could not be taken without due process of law.
94. Officer Chester knew or should have known that he did not have the legal right to kill Ava, when she posed no threat to him and that she did not threaten Officer Chester.
95. In his official capacity as a law enforcement officer, under color of state law, and acting within the ordinary course and scope of his employment, or, alternatively, in his individual capacity, Officer Chester fatally shot Ava without any legal right to do so.
96. Further, Officer Chester's conduct was reckless given the nature of the 9-1-1 call, the location of the incident in a quiet, residential neighborhood, the presence of three young children living inside the residence and additional children and other residents living in the immediate proximity of the location of the incident. In addition, Plaintiff Moore was a mere four to five feet from where Ava was shot, in the general direction of where Officer Chester aimed and shot his gun.

97. There was also a high level of danger to Plaintiffs and others due to the Feero's concrete driveway. The bullet had a higher chance of ricochet fire because of the concrete driveway and the bullet could have injured Ms. Moore, Mr. Feero, another person living on the street or someone driving by.

98. Defendant Chester acted intentionally and with malice to the Plaintiffs in shooting Ava, and depriving the Plaintiffs of their property rights under the Fourth Amendment.

99. As a direct and proximate result of Officer Chester's conduct, the Plaintiffs have been damaged in various respects including, but not limited to: being permanently deprived of the property value and companionship of their dog, Ava, as well as suffering severe mental and physical anguish due to the egregious nature of their loss, all attributable to the deprivation of their constitutional and statutory rights guaranteed by the Fourth Amendment of the Constitution of the United States and protected under 42 U.S.C. § 1983.

#### **SECOND CLAIM FOR RELIEF**

(42 U.S.C. § 1983 Fourth Amendment Violation)

100. Plaintiffs incorporate all paragraphs 1-99 of this Complaint for purposes of this claim.

101. This Claim for Relief is brought against Town of Erie and the Erie Police Department.

102. Acting under color of law and pursuant to official policy, custom or widespread practice, the Town of Erie and its Police Department knowingly,

recklessly or with deliberate indifference and callous disregard of Plaintiffs' rights, and the rights of dog owners in the Town of Erie, failed to instruct, supervise, control, equip, train, or discipline on a regular and continuing basis, police officers in their duties to refrain from unlawfully killing dogs and using excessive force against dogs that pose no immediate danger.

103. Defendant Town of Erie had specific knowledge of said policy, custom or practice and exhibited a deliberate indifference to the unreasonable risk of property damage or loss, which said policy, custom or practice posed.

104. The Town of Erie, prior to this incident, knew that shooting a family pet without justification was a violation of the pet owner's property rights protected by the United States Constitution, and that the killing of a dog constituted a seizure of property under the Fourth Amendment.

105. Town of Erie and its Police Department had an affirmative duty to prevent, or aid in preventing, the commission of such wrongs. Instead, knowingly, recklessly, or with deliberate indifference and callous disregard of Plaintiffs' rights and the rights of dog owners in the Town of Erie, these defendants failed and refused to do so.

106. The Town of Erie and its Police Department directly or indirectly, under color of law, approved or ratified the unlawful, deliberate, malicious, reckless, or wanton conduct of its police officers as described above.

107. The Town of Erie was fully aware that one or more of its police officers had previously shot and killed a companion animal, and still failed to act to provide any specific policy, training, supervision, or oversight to protect the

property rights of its citizens against having their companion animals unlawfully, needlessly, or unjustifiably killed or injured by its police officers.

108. The Town of Erie knew that pet animals were at risk from city employees, including its police officers. Despite at least one prior shooting and killing of a pet animal by an Erie police officer had occurred, the Town of Erie failed to put in place any plan, or to implement any plan to provide emergency veterinary services for animals injured by employees of the Town of Erie.

109. Officer Chester, nor any other Erie police officer had knowledge of the Town's plan or policy to provide emergency veterinary care to pets injured by employees of the Town of Erie, because such plan or policy did not exist.

110. Acting under the color of law, the Town of Erie knowingly, recklessly or with deliberate indifference and callous disregard of Plaintiffs' rights failed to instruct, supervise, train, or equip its officers as to their duties to a dog that had been shot and severely wounded by one of its officers.

111. As a direct and proximate result of such conduct, Plaintiffs have been damaged in various respects including, but not limited to, being permanently deprived of the property value and companionship of their dog, Ava, without the due process of law, as well as suffering severe mental and physical anguish due to the egregious nature of their loss, all attributable to the deprivation of their constitutional and statutory rights guaranteed by the Fourth Amendment of the Constitution of the United States and protected under 42 U.S.C. § 1983.

**THIRD CLAIM FOR RELIEF**

(Intentional Infliction of Severe Emotional Distress)

112. Plaintiffs incorporate paragraphs 1-111 of this Complaint for purposes of this claim.

113. This claim is brought against Defendant Erie Police Officer Chester, in his individual and official capacity.

114. Intentional infliction of severe emotional distress, by Officer Chester is the equivalent of willful and wanton conduct and is included in the legal definition of willful and wanton.

115. The decision to intentionally shoot a companion animal that had not been identified as vicious or aggressive and who did not injure or threaten Officer Chester or anyone else, or exhibit any aggression or vicious propensity was extreme and outrageous conduct, and was intended to inflict severe emotional harm to the Plaintiffs.

116. Officer Chester observed Ava's owner very close to Ava prior to his killing the dog, and saw the rawhide toy in the dog's mouth, heard Ms. Moore call to the dog, saw Ava stop walking and turn her head to look at Ms. Moore, and then he shot Ava, and then verbally accosted Ms. Moore, and prevented her from attending to or being with her dying dog, and then he lied and attempted to cover up about what actually occurred.

117. Officer Chester knew that deliberately shooting her dog in front of Brittany Moore would cause severe emotional distress to the Plaintiff Brittany Moore and shot Ava, anyway.

118. Officer Chester intentionally failed to contact Erie Animal Control or any veterinarians to render emergency medical care to Ava, preferring to keep Brittany Moore from her dying dog and intimidating her.

119. Shooting and killing Plaintiffs' companion animal Ava in the presence of Plaintiff Brittany Moore and within hearing distance of her young three daughters, Kaitlin Rose Landis, age 8, Kirstin Rae Landis, age 7, and Kaymen Renee Landis, age 5, was intentional. Plaintiffs' suffered from severe emotional distress, physical anguish and consequently required trauma counseling as a result.

120. As a direct and proximate result of such conduct, Plaintiffs have been damaged in various respects including, but not limited to, suffering severe emotional distress due to the intentional actions of Officer Chester.

#### **FOURTH CLAIM FOR RELIEF**

(Willful and Wanton Negligence)

121. Plaintiffs incorporate paragraphs 1-120 of this Complaint for purposes of this claim.

122. This claim is brought against Defendant Erie Police Officer Chester, in his individual and official capacity.

123. The decision to shoot a companion animal that had not been identified as vicious or aggressive and who did not injure or threaten Officer Chester or anyone

else, or exhibit any aggression or vicious propensity was an act purposefully committed by Officer Chester, who realized his conduct was dangerous, and which conduct was done heedlessly and recklessly, either without regard to the consequences, or without regard to the rights and safety of others, particularly the Plaintiffs.

124. Officer Chester observed Ava's owner very close to Ava prior to his killing the dog, saw the rawhide toy in the dog's mouth, heard Ms. Moore call to the dog, saw Ava stop walking and turn her head to look at Ms. Moore, and then he shot Ava, and then verbally accosted Ms. Moore, and prevented her from attending to or being with her dying dog, and then he lied and attempted to cover up about what actually occurred.

125. Officer Chester knew that deliberately shooting her dog in front of Brittany Moore would cause severe emotional distress to the Plaintiff Brittany Moore and shot Ava, anyway. This created a higher-than-normal risk of harm to the Plaintiffs.

126. Officer Chester intentionally or purposely failed to contact Erie Animal Control or any veterinarians to render emergency medical care to Ava, preferring to keep Brittany Moore from her dying dog and intimidating her.

127. Shooting and killing Plaintiffs' companion animal Ava in the presence of Plaintiff Brittany Moore and within hearing distance of her young three daughters, Kaitlin Rose Landis, age 8, Kirstin Rae Landis, age 7, and Kaymen Renee Landis, age 5, was willful and reckless. Plaintiffs' suffered from severe emotional

distress, physical anguish and consequently required trauma counseling as a result.

128. As a direct and proximate result of such conduct, Plaintiffs have been damaged in various respects including, but not limited to, suffering severe emotional distress due to the willful and wanton actions of Officer Chester.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs respectfully request that this Court enter judgment in their favor and against the Defendants, and grant:

- (a) Appropriate declaratory and other injunctive and/or equitable relief;
- (b) Compensatory and consequential damages, including damages for emotional distress, loss of enjoyment of life, and other pain and suffering on all claims allowed by law in an amount to be determined at trial;
- (c) All economic losses on all claims allowed by law;
- (d) Attorney's fees and the costs associated with this action, including those associated with expert witness fees, on all claims allowed by law;
- (e) Pre- and post-judgment interest at the lawful rate;
- (f) Any further relief that this court deems just and proper, and any other relief as allowed by law.

**PLAINTIFFS DEMAND A TRIAL BY JURY OF SIX ON ALL ISSUES TRIABLE**

Respectfully submitted this 5th day of July, 2012.

By: *Original signature of Jay Wayne  
Swearingen, #4842,*

*on file and available for inspection pursuant  
to C.R.C.P. 121.*

/s/ Jay Wayne Swearingen, Reg. # 4842

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Attorney for Plaintiff

*By: Original signature of Jennifer Reba  
Edwards, #38349,  
on file and available for inspection pursuant  
to C.R.C.P. 121.*

/s/ Jennifer Reba Edwards, Reg. # 38349

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Attorney for Plaintiff

Plaintiffs' Address:  
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Erie, Colorado 80516

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 5th day of July, 2012, a true and correct copy of the foregoing **COMPLAINT AND JURY DEMAND** was filed using Case Management/Electronic Case Filing to:

District Court, Boulder County, Colorado  
7325 S. Potomac Street  
Boulder, CO 80112

/s/ Jay Wayne Swearingen, Reg. # 4842

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Attorney for Plaintiff

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge Christine M. Arguello**

Civil Action No. 12-cv-02497-CMA-MJW

BRITTANY MOORE, a/k/a BRITTANY LANDIS,  
KAITLIN ROSE LANDIS,  
KIRSTIN RAE LANDIS, and  
KAYMEN RENEE LANDIS, Minors,  
by and through their next friend, BRITTANY MOORE,

Plaintiffs,

v.

TOWN OF ERIE, COLORADO, and  
ERIE POLICE OFFICER JAMIE CHESTER (Badge E-23), in his official  
and individual capacities,

Defendants.

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**ORDER DENYING IN PART AND GRANTING IN PART  
DEFENDANTS' MOTION TO DISMISS**

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This matter is before the Court on Defendants' Motion to Dismiss. (Doc. # 8.)

Plaintiffs Brittany Moore, and minors through Brittany Moore, Kaitlin Rose Landis, Kirstin Rae Landis, and Kaymen Renee Landis (collectively, "Plaintiffs") bring this suit against the Town of Erie and Erie Police Officer Jamie Chester (collectively, "Defendants") under Title 42 U.S.C. § 1983 and Colorado state law claims of intentional infliction of severe emotional distress and willful and wanton negligence. (Doc. # 3.) Jurisdiction is proper pursuant to 28 U.S.C. §§ 1331, 1441, and 1446 under federal question jurisdiction. (*Id.* at 2.)

## **I. BACKGROUND**

On May 10, 2011, at approximately 7:56 p.m., Plaintiff Moore called 911 to report a threatening phone call she received and requested that an officer come to her property for her protection. (Doc. # 3, ¶ 20.) Defendant Chester responded to the call, but initially went to the wrong address. (*Id.*, ¶¶ 21, 24.) Upon realizing his mistake, Defendant Chester proceeded to Plaintiff Moore's residence, which was next door. (*Id.*, ¶ 24.) At the time Defendant Chester arrived at the wrong address, Plaintiff Moore was standing on her front porch. (*Id.*, ¶ 25.) Plaintiff Moore's two dogs, one of which was a five-year-old German Shepherd named "Ava," approached Defendant Chester as he walked towards Plaintiffs' property. (*Id.*, ¶ 33.) Upon seeing the dogs approaching him, Defendant Chester began to walk backward with his hand on his holstered gun. (*Id.*, ¶ 35.) The dogs continued to approach Defendant Chester, who drew his gun and shot and killed Ava. (*Id.*, ¶ 51.)

On September 19, 2012, Plaintiffs filed a Complaint and Jury Demand alleging four claims for relief. (Doc. # 3.) First, Plaintiffs assert that Defendant Chester violated their Fourth Amendment right by shooting and killing Ava without any reasonable justification. (*Id.*, ¶ 90.) Second, Plaintiffs claim that the Town of Erie and its Police Department failed to instruct, supervise, control, equip, train, or discipline police officers in their duties to refrain from unlawfully killing dogs. (*Id.*, ¶ 102.) Third, Plaintiffs allege intentional infliction of severe emotional distress against Defendant Chester for shooting and killing Ava. (*Id.*, ¶ 120.) Lastly, Plaintiffs assert willful and wanton negligence against Defendant Chester for shooting and killing Ava. (*Id.*, ¶ 123.) Defendants filed

a Motion to Dismiss on September 12, 2012 (Doc. # 8), Plaintiffs filed a response on October 18, 2012 (Doc. # 10), and Defendants replied on November 11, 2012 (Doc. # 11).

## **II. STANDARD OF REVIEW**

A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) tests the formal sufficiency of a complaint. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003). A complaint will survive such a motion if it contains “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007). For a motion to dismiss, “[t]he question is whether, if the allegations are true, it is plausible and not merely possible that the plaintiff is entitled to relief under the relevant law.” *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1192 (10th Cir. 2009). “The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks and citation omitted).

In reviewing a Rule 12(b)(6) motion, a court “must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff.” *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991). Nevertheless, a complaint does not “suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). “The court’s function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff’s complaint alone is

legally sufficient to state a claim for which a relief may be granted.” *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

### **III. DISCUSSION**

In their motion to dismiss, Defendants assert that Plaintiffs fail to state a claim upon which relief may be granted on each of their four claims. (Doc. # 8 at 1.) The Court will address each claim in turn.

#### **A. FOURTH AMENDMENT VIOLATION CLAIM AGAINST DEFENDANT CHESTER**

Title 42 U.S.C. § 1983 provides a civil cause of action for individuals who are deprived of “any rights, privileges, or immunities secured by the Constitution and laws” by a person acting “under color of law.” *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, 150 (1970). Defendant Chester first contends that Plaintiffs failed to state a claim under which relief may be granted because he did not violate a constitutional right. (Doc. # 8 at 3.)

##### **1. Are Dogs “Effects” Within the Meaning of the Fourth Amendment?**

The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .” U.S. Const. amend.

IV. The Supreme Court “has treated the term ‘effects’ as being synonymous with personal property.” *Altman v. City of High Point*, 330 F.3d 194, 202 (4th Cir. 2003) (citing *Bond v. United States*, 529 U.S. 334, 336–37 (2000); *United States v. Jacobsen*, 466 U.S. 109, 114 (1984); *United States v. Place*, 462 U.S. 696, 701 (1983); *Nicchia v. New York*, 254 U.S. 228, 230 (1920); *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698,

701 (1897) (at common law a dog owner could bring an action of trover for conversion of a dog)). Although the Tenth Circuit has not addressed this issue, every circuit that has visited the issue has uniformly concluded that dogs are effects subject to the protection of the Fourth Amendment.<sup>1</sup> See *Carroll v. Cnty. of Monroe*, 712 F.3d 649, 649 (2d Cir. 2013) (unreasonable killing of a companion animal constitutes an unconstitutional seizure of personal property under the Fourth Amendment); *Maldonado v. Fontanes*, 568 F.3d 263, 271 (5th Cir. 2009) (“The killing of a person’s pet dog or cat by the government without the person’s consent is also a seizure within the meaning of the Fourth Amendment.”); *Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008) (dogs are effects and the killing of a companion dog constitutes a seizure); *Altman v. City of High Point*, 330 F.3d 194, 203 (4th Cir. 2003) (“[W]e hold that the plaintiffs’ privately owned dogs were ‘effects’ subject to the protection of the Fourth Amendment.”); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210 (3rd Cir. 2001) (killing of a person’s dog by a law enforcement officer constitutes a seizure); *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994) (“A dog is an ‘effect’ or ‘property’ which can be seized.”) *overruled on other grounds by* *Robinson v. Solano Cnty.*, 278 F.3d 1007 (9th Cir. 2002); *Lesher v. Reed*, 12 F.3d 148, 150–51 (8th Cir. 1994) (dogs are property subject to Fourth Amendment seizure requirements); *see also Scharfeld v. Richardson*, 133 F.2d 340, 341 (D.C. Cir. 1942) (“It is an established principle of the common law that a dog is personal property.”). Indeed, in Colorado, dogs enjoy the status of qualified property. *Thiele v. City and Cnty.*

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<sup>1</sup> Similarly, Senior Judge Matsch, of this District has found that an officer’s killing of a plaintiffs’ dog constituted a “loss of property” under the Fourth Amendment. (Case No. 10-cv-01895-RPM, Doc. ## 52, 53 at 1–2.)

*of Denver*, 312 F.2d 786, 789 (Colo. 1957); *see further Colorado Dog Fanciers, Inc. v. City and Cnty. of Denver By & Through City Council*, 820 P.2d 644, 653 (Colo. 1991) (dogs are property and their taking is subject to the police power of the state); Colo. Rev. Stat. § 25–4–601 (defining an “owner” as “any person who has a right of property in a dog, cat, [or] other pet animal.”) Therefore, this Court concludes that “Ava” was an effect as that term was used in the Fourth Amendment.

2. Does the Killing of a Dog Constitute a “Seizure” under the Fourth Amendment?

Having found that Ava was an “effect” subject to the protection of the Fourth Amendment, the Court must next consider whether Defendant Chester’s killing of Plaintiffs’ dog constituted a “seizure” under the Fourth Amendment. The Fourth Amendment “protects two types of expectations, one involving ‘searches,’ the other ‘seizures.’” *Jacobsen*, 466 U.S. at 113. “A seizure of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” *Id.* Destroying property meaningfully interferes with an individual’s possessory interest in that property. *Id.* at 124–25. Therefore, when Defendant Chester killed Plaintiffs’ dog, he “seized” Plaintiffs’ “effects.” *See Carroll*, 712 F.3d at 649 (unreasonable killing of a companion animal constitutes an unconstitutional seizure under the Fourth Amendment); *Viilo*, 547 F.3d at 710 (same); *Maldonado*, 568 F.3d at 271 (same); *Altman*, 330 F.3d at 205 (“[W]hen the officers destroyed the dogs, they ‘seized’ plaintiffs’ ‘effects.’”); *Brown*, 269 F.3d at 210; *Fuller*, 36 F.3d at 68 (“The killing of the dog is a destruction recognized as a seizure under the Fourth Amendment.”).

In support of Defendant Chester's argument that Plaintiffs do not have standing to assert a Fourth Amendment violation against him, he absurdly contends "an individual does not have standing to assert Fourth Amendment rights on behalf of another." (Doc. # 8 at 3–4.) However, the crux of Plaintiffs' claim is that Defendant Chester violated **their** rights when he unreasonably seized their property, not that Ava herself has Fourth Amendment rights. See *Kimcheloe v. Caudle*, No. A-09-CA-010LY, 2009 WL 3381047 at \*6 (W.D. Tex. Oct. 16, 2009) (finding defendants' argument—that plaintiffs' Fourth Amendment claim is without merit because "a dog has no 4th Amendment rights" and "[a]s a matter of law, there can never be excessive force under the 4th Amendment applied to a dog"—misplaced because plaintiffs alleged a claim on behalf of themselves and not their dog); see also *Fuller*, 36 F.3d at 68 ("[T]he destruction of property by state officials poses as much of a threat, if not more, to people's right to be 'secure in their effects' as does the physical taking of them.").<sup>2</sup>

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<sup>2</sup> Defendant Chester also argues that he did not seize Plaintiffs' property because he did not intend to gather evidence to use against Plaintiff Moore. (Doc. # 8 at 5.) Defendant Chester cites to *Graham v. Connor*, 490 U.S. 386 (1989), which, under even the most liberal reading does not stand for the proposition Defendant Chester asserts. Instead, in that case, the Supreme Court declared that § 1983 excessive use of force claims are properly analyzed as violations of the Fourth Amendment, rather than under substantive due process. *Id.* at 398. Likewise, Defendant Chester cites to *Rakas v. Illinois*, 439 U.S. 128 (1978) to claim that "a person is aggrieved under the Fourth Amendment when evidence is illegally seized and with the intent of using it against them in a future legal action." While this may be true, it is not the only circumstance in which a person can assert his or her Fourth Amendment rights. See *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 68 (1992) (owners of a mobile home destroyed by a sheriff appropriately brought their claim under § 1983 for a deprivation of property protected by the Fourth Amendment). Defendant Chester confuses the exclusionary rule in criminal matters with a civil claim for deprivation of property under § 1983.

Plaintiffs have stated a viable claim for deprivation of property under the Fourth Amendment. Thus, the motion to dismiss on the Title 42 U.S.C. § 1983 Fourth Amendment violation claim against Defendant Chester is denied.<sup>3</sup>

#### **B. MUNICIPAL LIABILITY CLAIM PURSUANT TO 42 U.S.C. § 1983**

The Town of Erie argues that Plaintiffs failed to state a claim as to their second claim because Plaintiffs did not establish an underlying constitutional deprivation under the Fourth Amendment. (Doc. # 8 at 5.) The Court finds that Plaintiffs did not establish the requisite elements of a municipal claim against the Town of Erie.

It is well-settled that to establish a municipal liability claim pursuant to Title 42 U.S.C. § 1983, a plaintiff must demonstrate: (1) the existence of a municipal policy or custom, and (2) a direct causal link between the injury alleged and a municipal policy or custom.<sup>4</sup> *Bryson v. City of Oklahoma City*, 627 F.3d 784, 788 (10th Cir. 2010). A “municipal policy or custom” may include the “failure to adequately train or supervise employees, so long as that failure results from ‘deliberate indifference’ to the injuries that may be caused.” *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998) (citing *City of Canton v. Harris*, 489 U.S. 378, 388–91 (1989) (A failure to train can support a claim against a municipality if “the need for more or different training is so obvious, and

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<sup>3</sup> The Court declines to address Defendant Chester’s arguments regarding qualified immunity, which he raises for the first time in his reply. However, he is free to raise these arguments at the summary judgment stage.

<sup>4</sup> Citing to *Holland ex. re. Overdorff v. Harrington*, 268 F.3d 1179, 1187 (10th Cir. 2001), the Town of Erie asserts that Plaintiffs must establish “an affirmative link between the training, policies, and supervision provided by the Town and the constitutional deprivation alleged in the Complaint.” (Doc. # 8 at 5.) However, *Holland* addresses supervisory liability in a § 1983 action, 268 F.3d at 1187, and does not address municipal liability, which is the basis of Plaintiffs’ claim. (Doc. # 10 at 9.)

the inadequacy is so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent" to the need for additional training.); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189–90 (10th Cir. 2010)).

A municipality may be held liable under § 1983 only for its own unconstitutional or illegal policies and not for the tortious acts of its employees. *Barney*, 143 F.3d at 1307; see *Bryson*, 627 F.3d at 788 (a municipality may not be held liable under § 1983 solely based on its status as an employer). "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *City of Canton*, 489 U.S. at 390–91. "Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." *Id.* at 391. "Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal." *Id.*

In their Complaint, Plaintiffs allege that Defendant Chester previously shot and killed another family pet (Doc. # 3, ¶ 55), and that the Town of Erie consciously or deliberately chose to disregard the risk of harm in failing to implement a policy after the first pet was killed (Doc. # 10 at 10). One previous instance, however, is not sufficient to prove a municipal policy or custom. See *City of Canton*, 489 U.S. at 391 ("[A]dequately trained officers occasionally make mistakes; the fact that they do says

little about the training program or the legal basis for holding the city liable.”). The Court finds that this one prior incident is insufficient to provide the Town of Erie with the actual or constructive notice that it needed to implement a policy or training program. The Town of Erie was not “deliberately indifferent” to the need for additional training, thus, the Court grants the motion to dismiss on this claim.

### **C. STATUTE OF LIMITATIONS FOR STATE LAW CLAIMS**

A claim is subject to dismissal for failure to state a claim for relief if the allegations in the complaint show that relief is barred by the applicable statute of limitations. *Jones v. Bock*, 549 U.S. 199, 215 (2007). The defense of statute of limitations may be resolved upon a motion to dismiss where the complaint shows on its face that the action has not been instituted within the statutory period. See *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980) (“While the statute of limitations is an affirmative defense, when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute.”)

Defendant Chester argues that Plaintiffs’ claims for intentional infliction of emotional distress and willful and wanton negligence should be dismissed as barred by the statute of limitations. (Doc. # 8 at 6.) Colo. Rev. Stat. § 13–80–103(1)(c) provides, in pertinent part, that “[a]ll actions against sheriffs, coroners, police officers, firefighters, national guardsmen, or any other law enforcement authority” shall be “commenced within one year after the cause of action accrues.” Plaintiffs filed their complaint on

July 5, 2012, and Defendant Chester killed their dog over a year earlier, on May 10, 2011. (Doc. # 10 at 13.)

However, Plaintiffs argue that the two-year limitation of Colo. Rev. Stat. § 13–80–102 applies to these claims because they are “actions upon liability created by a federal statute.” § 13–80–102 states, in pertinent part, that “civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within two years after the cause of action accrues” for tort actions, including negligence, and “actions upon liability created by a federal statute where no period of limitation is provided in said federal statute.” Colo. Rev. Stat. § 13–80–102(1)(a)(g). Although Colo. Rev. Stat. § 13–80–102 governs the statute of limitations for § 1983 claims, Defendant Chester asserts his statute of limitations defense only as to Plaintiffs’ intentional infliction of severe emotional distress and willful and wanton negligence claims, which arise under Colorado law, rather than § 1983. See *Nicholas v. Boyd*, 317 F. App’x 773, 777 (10th Cir. 2009) (citing *Blake v. Dickason*, 997 F.2d 749, 750–51 (10th Cir. 1993)); *Nieto v. State*, 952 P.2d 834, 844 (Colo. App. 1997) *reh’g denied, cert. granted, aff’d in part, rev’d in part on other grounds, State v. Nieto*, 993 P.2d 493 (Colo. 2000) (In Colorado the applicable statute of limitations for § 1983 actions, even those asserted against enforcement officers, is the two-year limitation period of § 13–80–102(1)(g).).

Moreover, applying rules of statutory construction, the Tenth Circuit has held that the one-year limitation period in Colo. Rev. Stat. § 13–80–103 applies to actions against police officers because it is specific, whereas § 13–80–102(a) is a general statute of limitation. *Donohue v. Hoey*, 109 F. Appx. 340, 369 (10th Cir. 2004) (“a specific statute

preempts a general statute"). Therefore, Colorado's one-year statute of limitations applies to these state claims. See *id.*; *Handy v. Pascal*, 2011 WL 5176153, at \*9–10 (D. Colo. Aug. 29, 2011) (Colo. Rev. Stat. § 13-80-103(1)(c) applies to actions against police officers; thus, plaintiff was required to bring his state-law tort claims within the one year, rather than the two-year limitations period applicable to § 1983 claims), *aff'd and adopted by* 2011 WL 5240435, (D. Colo. Oct. 31, 2011); *McTwigan-Evans v. Spaulding*, 2006 WL 1517735, at \*1 (D. Colo. May 30, 2006) (The statute of limitations under Colo. Rev. Stat. § 13-80-103(1)(c) for actions against a police officer is one year.).

Plaintiffs further contend that, even if the Court determines that the one year limit applies, their state law claims should not be dismissed because the cause of action "accrue[s] on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." See Colo. Rev. Stat. § 13-80-108(1). Here, it is undisputed that Defendant Chester shot Plaintiffs' dog on May 10, 2011. (Doc. # 10 at 13; Doc. # 8 at 6.) Plaintiff Moore was present when Defendant Chester shot her dog, therefore the dates given in the Complaint make clear that Plaintiffs discovered or reasonably should have discovered their injury on May 10, 2011. See *Aldrich*, 627 F.2d at 1041. Therefore, the statute of limitations on Plaintiff's state law claims began to run when Defendant Chester shot Plaintiffs' dog.

Plaintiffs argue, without citing to authority, that "some of the conduct that gives rise to [their] claims had not yet occurred." (Doc. # 10 at 14.) Plaintiffs offer, by way of example, that "Erie's so called 'investigation' into the shooting and Defendant Chester's

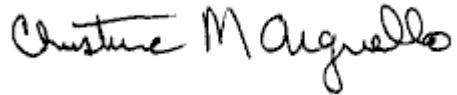
attempt to cover up what happened did not all occur on May 10, 2011 [n]or was it immediately known to Plaintiffs that Chester had previously killed another family dog while employed by Defendant Erie.” (Doc. # 10 at 14.) These examples are not a sufficient factual basis to toll the statute of limitations or establish that the date of Plaintiffs’ injury occurred on a day other than May 10, 2011. A claim for intentional infliction of severe emotional distress accrues “on the date when the injury was incurred and the emotional impact was felt.” *Cline v. S. Star Cent. Gas Pipeline, Inc.*, 191 F. App’x 822, 827 (10th Cir. 2006) (quoting *Moore v. Luther ex. rel. Luther*, 291 F. Supp. 2d. 1194, 1199 (D. Kan. 2003)). Similarly, a negligence cause of action accrues on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. *P.R. v. Zavaras*, 49 F. App’x 836, 839 (10th Cir. 2002); *Brooks v. Bank of Boulder*, 891 F. Supp. 1469, 1481 (D. Colo. 1995). Here, the alleged facts show that Plaintiffs knew on May 10, 2011 the injury and its cause essential to their claim against Defendant Chester (*i.e.* that Defendant Chester killed their dog). Thus, the Court concludes that Plaintiffs’ claims for intentional infliction of severe emotional distress and willful and wanton negligence should be dismissed as time-barred because Plaintiffs filed them more than one year after May 10, 2011.

**IV. CONCLUSION**

Based on the foregoing, it is ORDERED that Defendants' Motion to Dismiss (Doc. # 10) is GRANTED IN PART and DENIED IN PART. Specifically, it is ORDERED that Plaintiffs' Second, Third, and Fourth Claims are DISMISSED WITH PREJUDICE.

DATED: July 19, 2013

BY THE COURT:



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CHRISTINE M. ARGUELLO  
United States District Judge

**SOURCE. . URL:<http://www.thedenverchannel.com/news/local-news/settlement-reached-in-police-shooting-of-erie-dog-pet-owner-says-case-has-never-been-about-money05212015>.**  
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# Settlement reached in police shooting of Erie dog; pet owner says case has never been about money

**BY:** TheDenverChannel.com Team (mailto:[kmghwebstaff@kmgh.com](mailto:kmghwebstaff@kmgh.com))

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**TAG:** police (/topic/police) | settlement (/topic/settlement) | erie (/topic/erie) | brittany moore (/topic/brittany+moore) | ava (/topic/ava)

DENVER, Colo. - After four years of litigation, a settlement has been reached in a dog shooting case, stemming from a 2011 incident involving Erie police.

On May 10, 2011, Brittany Moore's dog, Ava, a German shepherd, was shot and killed by Erie Police Officer Jamie Chester as he was responding to her call for assistance after a threatening phone call she received.

**PREVIOUS** | Family dog killed by police officer (<http://www.thedenverchannel.com/news/family-dog-killed-by-police-officer>)

The same officer shot and killed a black Labrador in 2007, after it mauled a 9-year-old boy.

The Boulder County District Attorney's office did not file charges against Officer Chester, citing he "was justified in using deadly and physical force."

7NEWS called Erie police and found officers are equipped with snare poles and pepper spray.

Lawyers for Moore said three witnesses to the shooting agreed that Ava did not show any aggressive behavior toward the officer at any time and still had a rawhide bone in her mouth when she was shot.

Moore accepted a \$40,000 financial settlement as a result of the shooting, while the Erie Police Department has implemented new, nonlethal training and equipment for dog encounters during police activities, according to the lawyers.

"This case has never been about the money," said Moore. "I have spent the last four years working to make positive changes in police procedures that work to everyone's benefit."

Since the shooting, Moore has been an advocate for change in how police officers interact with dogs.

**PREVIOUS** | Police officer, town of erie sued over fatal dog shooting

(<http://www.thedenverchannel.com/news/police-officer-town-of-erie-sued-over-fatal-dog-shooting-2>)

Moore was also a spokesperson for the Dog Protection Act, which in 2013 became law in Colorado. The legislation requires law enforcement officials across the state to undergo dog encounter training.

She has also been featured on national television and in documentaries, raising awareness on the issue of police shooting dogs.

"Brittany has been steadfast in her determination to protect the public and their animals since she lost Ava," said Jennifer Edwards, attorney and founder of The Animal Law Center based in Englewood. "Because of Brittany's efforts, the Erie Police Department has adopted new, nonlethal procedures for handling canines while conducting police business."

Edwards has worked on several of these cases at the Animal Law Center. She said the ultimate problem is the lack of protocol.

"There are really no use of force policies when it comes to the family pet," Edwards told 7NEWS in 2012. "Most officers shoot first and ask questions later when it comes to the family pet."

It's took a year for the family to file a suit because Moore said she wanted to give the officer time to apologize, but that never happened.

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